LING TOWI SING & ORS v. SINO AMERICA TOURS CORPORATION PTE LTD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
HADHARIAH SYED ISMAIL JCA
SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-1107-06-2019]
9 MARCH 2022

Abstract – *Equality before the law is a dynamic concept, in that, the law would treat like cases alike and unlike cases differently, ie, there must be 'reasonable' or 'permissible' classification founded on 'intelligible differentia'. In this light, in a case involving a person with disability, as in this case, mental disability having set in after the cause of action has arisen, s. 24 the Limitation Act 1953 does not provide for a suspension of the limitation period; the action was thus barred by limitation. The limitation period is suspended only if the person suing was already under disability when the cause of action arose. Section 24, therefore, treats like cases alike and unlike cases differently. And, where the cases are not covered by s. 24, the normal limitation period would apply.*

LIMITATION: *Cause of action – Accrual of – Mentally disabled person – Appointment of committee – Family members appointed to manage affairs – Action for amount due under share sale agreement – Whether disability already set in when cause of action arose – Whether s. 24 of Limitation Act 1953 applicable only where disability has set in before cause of action arose – Whether limitation period could be suspended if cause of action arose before disability set in – Whether Limitation Act 1953 in conflict with Federal Constitution – Whether action barred by limitation*

MENTAL DISORDERS AND TREATMENT: *Appointment of committee – Mentally disabled person – Family members appointed to manage affairs – Action for amount due under share sale agreement – Whether disability already set in when cause of action arose – Whether Limitation Act 1953 provides for suspension of limitation period in instances where cause of action arose before disability set in – Whether action barred by limitation*

The appellants were the family members of the late Dato' Ng Kong Yeam ('Dato' Ng'), the first appellant being his lawful wife and the second to fourth appellants, his children with the first appellant. He was also living, since 1995, with one Madam Kay, who had the sole control of the respondent company. In September 2012 Dato' Ng was diagnosed with frontal-temporal dementia of moderately advanced stage and was gradually unable to take care of himself, much less his business concerns. In 2013, the appellants, pursuant

to an application to the High Court under the Mental Health Act 2001 ('MHA'), obtained an order declaring Dato' Ng was of unsound mind and incapable of managing himself and/or his affairs due to his mental disorder and the right act as the next friend of the said Dato' Ng Kong Yeam in legal proceedings to be instituted against such person or persons or company or companies who may be liable to Dato' Ng Kong Yeam or to his estate and to act as the next friend or guardian *ad litem* of the said Dato' Ng Kong Yeam in legal proceedings generally ('committee order'). Armed with the committee order, the appellants filed a suit claiming against the respondent, which was under the sole control of Madam Kay, the sum of RM5,313,000 being the purchase price remaining unpaid for the sale of Dato' Ng's shares in Pahlawan Sdn Bhd ('Pahlawan') *vide* a sale of shares agreement ('shares sale agreement') of 16 October 2006. The shares had already been registered in the respondent's name on 18 December 2007. In the High Court, the issues were: (i) whether the appellants' action as plaintiffs in the High Court was barred by limitation; and (ii) whether the appellants had proved, on the balance of probabilities, the amount owing. The High Court, while holding that the appellants had proved their case on the balance of probabilities, nevertheless held that the appellants could not enter judgment against the respondent as limitation had set in and hence, dismissed the appellants' claim. The High Court, *inter ali*a, held that s. 24 of the Limitation Act 1953 ('LA') does not discriminate against persons of disability as it provides a facility by which time is extended during the period of disability.

Held (dismissing appeal with costs)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The appellants were only appealing on the issue of limitation which was decided in favour of the respondent. Therefore, the respondent should have filed a notice of appeal against the finding of liability against the respondent, if not for the limitation. As the respondent had not done so, the respondent could not challenge the findings of fact on liability by way of letter to the appellants' solicitors giving notice of the matters to be raised at the hearing of the appeal. The notice *via* letter was not a competent appeal and hence, the court could not entertain the respondent's attempt to set aside the finding of fact on the issue of debt being due and owing but for limitation having set in and the issue of the appellants' claim having the proper locus to prosecute the claim. (paras 13-15 & 19)

(2) When the cause of action arose, no disability had set in yet. The LA does not provide for a suspension of the limitation period for a case where the cause of action has arisen before the disability sets in. The LA provides for a suspension of the limitation period if the person suing was already under disability when the cause of action arose. It is suspended for the period during which the disability is operating and comes to an

end when the disability ceases or when a committee is appointed under the MHA to manage the affairs of the person under disability. (paras 42 & 43)

(3) In a case where the disability sets in after the cause of action has arisen, it is difficult, if not, impossible, to identify at what point in time limitation should be suspended. There is also the prejudice caused to the defendant if the plaintiff's family members were to apply for a committee order many years after the limitation period is over for not only would memory fade and vital documents may no longer be retrievable but that the sword of Damocles would be hanging over the heads of such a defendant for a long time until the family members should decide to apply to court for a committee order. (para 55)

(4) To say that s. 24 of the LA does not treat all persons with a valid cause of action alike and therefore discriminatory, is to miss the obvious. Section 24 treats all cases alike where the disability has set in before a cause of action has arisen. Where there is an intervening disability after the cause of action has arisen, s. 24 is not applicable. Therefore, s. 24 treats like cases alike and unlike cases differently. Section 3 of the LA provides that the LA does not apply if an action is governed by another statute that provides for a different period of limitation. (paras 87-89)

(5) In cases where it could be shown that a pre-Merdeka law is in conflict with the Federal Constitution, the court is constitutionally bound to interpret the offending provision to be in tandem with and consistent with the Federal Constitution. However, whilst the LA is a pre-Merdeka law, it is not in conflict with art. 8 of the Federal Constitution. Hence, the court could not interpret s. 24 of the LA as extending the same suspension of limitation to a case where the disability set in after the cause of action has arisen. (paras 99, 104 & 105)

(6) It is for Parliament to legislate if there is a *lacuna* in the law. In this case, there was none because Parliament provides for the normal limitation period to apply in a case not covered by s. 24 of the LA. Section 24 is thus an exception to the general rule with respect to limitation. If one does not come within the exception provided, the court could not under the guise of doing justice, legislate on behalf of Parliament. (para 114)

(7) One needs only to look at the amendments introduced by the Limitation (Amendment) Act 2018 (Act A1566) to appreciate that where the strict application of limitation may work injustice in the case of latent defects or injuries other than personal injuries in a tort claim, there was nothing the court could do without violating the domain of the Legislature to make new laws to address this issue. Some courts, in trying to buffer the harshness of the strict interpretation of s. 6 of the LA, had interpreted

A the cause of action as having accrued or arisen from the time the injury, defect or damage was discovered or could have been reasonably discovered. The new s. 6A was introduced to address this issue. A corresponding amendment had then to be made in a case of a s. 24 situation where a disability arises before the discovery of the latent
B defect or injury and this Parliament did by introducing s. 24A. Parliament could have provided for another situation where the disability arises after the discovery of the latent defect or injury other than personal injury, but it did not see it fit to do so. Therefore, the trial judge had not erred in his interpretation of s. 24 of the LA and
C limitation, with all its stark reality, had set in by the time the suit was filed in the High Court. (paras 115, 118-121 & 128)

Case(s) referred to:

Affin Credit (M) Sdn Bhd v. Yap Yuen Fui [1984] 1 CLJ 149; [1984] 1 CLJ (Rep) 62 FC ***(refd)***

AJS v. JMH & Another Appeal [2022] 1 CLJ 331 FC ***(refd)***

D *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA* ***(refd)***

AmBank (M) Bhd v. Kamariyah Hamdan & Anor [2013] 5 MLJ 448 ***(refd)***

Assa Singh v. Mentri Besar, Johore [1968] 1 LNS 9 FC ***(refd)***

Attorney-General Of The Gambia v. Momodou Jobe [1984] 1 AC 689 ***(refd)***

CIMB Bank Bhd v. Lee Kim Kee & Ors And Another Appeal [2018] 9 CLJ 168 CA ***(refd)***

E *Damai Jaya Realty Sdn Bhd v. Pendaftar Hakmilik Tanah, Selangor [2015] 1 LNS 7 CA* ***(refd)***

Datuk Haji Harun Haji Idris v. PP [1976] 1 LNS 19 FC ***(refd)***

Hector v. A-G of Antigua And Barbuda & Ors [1990] 2 All ER 103 ***(refd)***

Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC ***(refd)***

F *Kerajaan Malaysia v. Ambiga Sreenevasan & Ors [2016] 8 CLJ 330 CA* ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals [2018] 1 CLJ 585 FC ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

G *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd [2014] 8 CLJ 188 CA* ***(refd)***

Peninsular Concord Sdn Bhd v. Syarikat Bekalan Air Selangor [2015] 3 CLJ 682 HC ***(refd)***

Purnell v. Roche [1927] 2 Ch 142 ***(refd)***

Sharikat Ying Mui Sdn Bhd v. Hoh Kiang Po [2016] 1 LNS 1442 HC ***(refd)***

H *Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC* ***(refd)***

Ziko Abbo & Anor v. Ketua Polis Daerah Bau, Kuching, Sarawak & Ors [2011] 3 CLJ 76 CA ***(refd)***

Legislation referred to:

Aboriginal Peoples Act 1954, s. 12

I Federal Constitution, arts. 5, 8(1), 162(6)

Interpretation Acts 1948 and 1967, s. 17A

Limitation Act 1953, ss. 3, 6, 6A, 24(1), 24A

National Land Code, ss. 214A, 301

Peaceful Assembly Act 2012, s. 6
Public Authorities Protection Act 1948, s. 2
Rules of Court 2012, O. 76 r. 2(1)

Limitation Act 1963 [Ind], s. 9
Limitation Act 2005 [Aust], s. 35
Limitation Act Chapter 13 [Canada], s. 25
Real Property Limitation Act 1874 [UK], s. 3

Other source(s) referred to:
Choong Yeow Choy, *Law of Limitation,* Butterworths Asia 1995, p 89
Srimurugan Alagan, *Federal Constitution – A Commentary,* 2019, Sweet & Maxwell, p 123

For the appellants - Ling Hua Keong & Audrey Chong Pei Ying; M/s Ling & Mok
For the respondent - Jayabalan Raman Kutty & Fadhil Ihsan Mohamad Hassan; M/s Azwad Ihsan & Co

[Editor's note: For the High Court judgment, please see Ling Towi Sing & Ors v. Sino America Tours Corporation Pte Ltd [2019] 1 LNS 2394 (affirmed).]

Reported by S Barathi

JUDGMENT

Lee Swee Seng JCA:

[1] The appellants are the family members of the late Dato' Ng Kong Yeam ("Dato' Ng"); the first appellant being his lawful wife and the second to the fourth appellants, his children with the first appellant. He was a lawyer who also ventured into some businesses in Malaysia and Singapore and appeared to have done reasonably well.

[2] It was an open secret that he was also living, since 1995, with another woman in Singapore by the name of Madam Kay Swee Pin ("Madam Kay"), who had the sole control of the respondent company. When from around 2010 onwards, as Dato' Ng's health began to deteriorate, Madam Kay sent him back to live with his lawful wife in Johor.

[3] Dato' Ng's health declined on a speedy downward slide as he was diagnosed with frontal-temporal dementia of moderately advanced stage in September 2012. To this day, it remains a mystery why a mentally active person should succumb to dementia. Its debilitating effect was clearly seen in Dato' Ng's gradual inability to take care of himself, much less his business concerns.

[4] In 2013 his family members in the appellants decided to make an application to the High Court of Malaya in Johor Bahru *vide* Originating Summons No: 24NCVC-241-10-2013 for a mental health order under the Mental Health Act 2001("MHA") and for a committee to be appointed to manage his affairs.

[5] On 6 December 2013, the Johor Bahru High Court declared that Dato' Ng was of unsound mind and incapable of managing himself and/or his affairs due to his mental disorder and granted the appellants the right to "act as the next friend of the said Dato' Ng Kong Yeam in legal proceedings to be instituted against such person or persons or company or companies who may be liable to Dato' Ng Kong Yeam or to his estate and to act as the next friend or guardian *ad litem* of the said Dato' Ng Kong Yeam in legal proceedings generally ("committee order").

[6] Armed with the committee order, the appellants herein filed a suit in the Kuala Lumpur High Court as plaintiffs below, claiming against the respondent as defendant, which was under the sole control of Madam Kay, the sum of RM5,313,000 being the purchase price remaining unpaid for the sale of Dato' Ng's shares in Pahlawan Sdn Bhd ("Pahlawan") *vide* a sale of shares agreement ("shares sale agreement") of 16 October 2006 together with interest, costs and such further and other reliefs as the court may deem fit and proper to grant. The shares had already been registered in the respondent's name on 18 December 2007 *vide* Certificate No. 056.

In The High Court

[7] At the High Court two issues were canvassed by the parties. The first was whether the appellants' action as plaintiffs in the High Court was barred by limitation and the second was whether the plaintiff had proved on the balance of probabilities the amount owing.

[8] For the reasons given by the learned trial judge, the High Court held that the plaintiffs had proved their case on the balance of probabilities but as limitation had set in the plaintiffs nevertheless could not enter judgment against the defendant and so the plaintiffs' claim was dismissed with costs of RM10,000.

[9] The appellants had appealed to the Court of Appeal on the issue of limitation in that the learned High Court Judge had erred when he held that limitation has set in. Instead the learned High Court Judge should have held that until the committee was appointed by the High Court pursuant to their application under the Mental Health Act 2001, Dato' Ng was under a disability and so limitation should be suspended until the committee order was granted.

[10] It was also argued that s. 24 of the Limitation Act 1953 was unconstitutional in that it discriminates between a case where a person was under a disability when the cause of action arose as opposed to one where the disability set in subsequent to the date the cause of action arose in that there is a suspension of limitation in the former until the disability is no more but not in the case of the latter.

[11] The learned High Court Judge had held that s. 24 of the Limitation Act 1953 does not discriminate against persons of disability as it in fact provides a facility by which time is extended during the period of disability. The High Court further held that the fact that the provision has been worded in a manner to only assist persons whose disabilities were in existence at the time the cause of action accrued does not mean that it is discriminatory and in breach of art. 8 of the Federal Constitution in that it offends the equality of law protection or the equal treatment under the law.

[12] The learned High Court Judge observed that as the committee order was granted on 6 December 2013, the plaintiffs had about two weeks to file their action before limitation set in and that their failure to do so meant that the action was time-barred.

Whether The Respondent May Still Challenge The Finding Of Fact Of Liability But For Limitation Having Set In When No Notice Of Appeal Had Been Filed

[13] The defendant did not appeal on the finding of the High Court that but for limitation, the plaintiffs would have been allowed to enter judgment for the sum claimed together with interest and costs as the plaintiffs had proved their claim on a balance of probabilities.

[14] Learned counsel for the respondent tried to challenge the High Court findings of fact on liability by way of a letter from the respondent's solicitors to the appellant's solicitors dated 5 May 2020 giving notice that the respondent shall raise the following matters at the hearing of the appeal:

1. That at the end of the trial the learned judge may arrive at a conclusion that is different from that of the Court of Appeal on the issue of locus of the appellants/plaintiffs to maintain the action as the conclusion of the Court of Appeal was made merely on an interlocutory application;

2. That the appellants/plaintiffs do not have the locus to maintain the action on behalf of Dato' Ng Kong Yeam as they were not the litigation representatives of Dato' Ng under O. 76 r. 2 of the Rules of Court 2012;

3. That on evidence the respondent/defendant has proven on the balance of probabilities that the consideration under the Sale of Shares Agreement was paid and did not remain due and payable to Dato' Ng;

4. That the learned judge misdirected himself in evaluating the evidence of payment of the consideration produced by the respondent/defendant and in his observations of the evidence and further his findings were against the weight of the evidence;

5. That the learned judge misdirected himself in failing to appreciate that the evidence of payment of the consideration as produced by the defendant/respondent was not rebutted by Dato' Ng who had filed the claim *via* the appellants/plaintiffs;

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> 6. That in evaluating the evidence of payment of the consideration the learned judge misdirected himself in failing to appreciate that Dato' Ng is the claimant and the appellants/plaintiffs had merely stepped into the shoes of Dato' Ng in pursuing the claim. ("the respondent's Notice *via* Letter").

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[15] We agree with learned counsel for the appellants that since the appellants were only appealing on the issue of limitation which issue was decided in favour of the respondent, the respondent should file a notice of appeal against the finding of liability against the respondent, if not for the limitation. As the respondent had not so done, the respondent cannot challenge the said finding of fact by way of the respondent's notice *via* letter.

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[16] We agree with the propositions of law laid down by the Federal Court in *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149; [2016] 5 MLJ 557 at pp. 158 and 159 (CLJ); at pp. 567 to 571 (MLJ), where it was decided, that:

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> [18] It is our considered view that since the High Court found that a valid and binding agreement was concluded between the plaintiff and the first defendant and *such a finding being adverse against the first defendant, the first defendant should have filed a separate notice of appeal ie, if the first defendant wanted the aforesaid decision to be reversed or set aside.*

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> [19] Useful reference can also be made to the provision of s. 67(1) of the Courts of Judicature Act 1964 ("CJA 1964") which provides as follows:
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> 67. Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

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> [20] We are of the view that s. 67(1) of the CJA 1964 clearly provides that a litigant has the right of appeal to appeal against "any judgment or order of any High Court". It is therefore trite that such an appeal must be filed pursuant to r. 5 of the RCA 1994.

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> [23] We are of the view that under r. 8 of the RCA 1994 *the first defendant cannot set aside the substantive finding of facts made by the High Court by way of notice of cross-appeal. The first defendant may only set aside the substantive findings of the High Court by way of filing a notice of appeal under r. 5 of the RCA 1994.* Only an appeal by way of a notice of appeal constitutes a re-hearing. Rule 8 of the RCA 1994 does not state that a notice of cross-appeal "... shall be by way of re-hearing". Rule 8 of the RCA 1994 only provides that a respondent could only contend that the decision of the High Court should be varied if the respondent files the notice of cross-appeal within ten days after the service of the record of appeal.

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[26] The notice of appeal filed by the appellant shall comply with Form 1, which contains the words "being dissatisfied with the decision(s)" of the judge. On the other hand the notice of cross-appeal shall comply with form 2, which contains the words of "will contend that the decision(s)" of the judge "ought to be varied to the extent and on the grounds hereinafter set out." (emphasis added)

[17] The propositions to be gleaned from the above case can be stated as follows:

(i) a party seeking to reverse or set aside a finding adverse to him should have filed a separate notice of appeal;

(ii) a notice of cross-appeal cannot set aside the substantive finding of facts made by the High Court; and

(iii) where a respondent wishes to raise matters which are unconnected with the substance of the appeal by the appellant, the respondent must proceed by way of a separate notice of appeal.

[18] We agree with learned counsel for the appellants that the issues of non-payment by the respondent of the purchase price of the shares and that of the locus of the appellants as plaintiffs in the High Court below to bring the action are issues unrelated to that of limitation and so the respondent/defendant has to file a notice of appeal and not a notice of cross-appeal.

[19] There was no notice of appeal filed and the notice *via* letter is not a proper appeal filed for the purpose of challenging the High Court's finding of fact and interpretation of the law on *locus standi*. The notice *via* letter is not a competent appeal and hence this court cannot entertain the respondent's attempt to set aside the finding of fact on the issue of the debt being due and owing but for limitation having set in and the issue of the appellants/plaintiffs having the proper locus to prosecute the claim.

Whether The Issue Of Limitation May Be Decided Afresh By The Trial Judge Hearing The Parties When The Previous Judge Hearing The Application To Strike Out The Appellants' Claim Had Found Against The Respondent On That Issue

[20] There is some history to the current appeal in that there was a previous appeal to this Court of Appeal by the same appellants who were the plaintiffs in the High Court. The narration of the relevant applications and decisions are set out below as summarised by the appellants in their written submission to this court.

[21] There was an earlier application on 20 August 2015 by the respondent who as defendant applied to strike out the plaintiffs' claim on two grounds namely that limitation had set in and that the plaintiffs did not have the

A capacity to initiate and file the action as they were not the litigation representative as required by O. 76 r. 2(1) of the Rules of Court 2012 ("ROC").

[22] The learned judge hearing the application then, allowed the defendant's application on 18 January 2016 and struck out the plaintiffs' writ and statement of claim on ground that there was a failure of the plaintiffs to comply with O. 76 r. 2(1) of the ROC as the plaintiffs were not the legal representative of Dato' Ng as required under that provision but are only the next friend or guardian *ad litem* of Dato' Ng.

[23] However, on the issue of limitation, the learned judge held that the six years should run from the granting of the committee order which was on 6 December 2013 and since the plaintiffs' claim was filed on 29 April 2015 it was filed well within the time and certainly not time-barred.

[24] The plaintiffs then as appellants appealed to the Court of Appeal and the then solicitors for the respondent also filed a motion for extension of time to cross-appeal against the learned judge's findings in the striking out decision which motion was dismissed on 1 November 2016.

[25] The Court of Appeal heard the appellants' appeal against the striking out decision and allowed the appeal. As there was no appeal on the issue of limitation, it was not an issue before the Court of Appeal. The Court of Appeal held that under the MHA there is a specific mechanism for a committee or committee of persons to be appointed by the court to manage the mentally disordered person who is incapable of managing himself or his affairs due to his mental disorder.

[26] The Court of Appeal further held that the committee order empowered them to act as the next friend of Dato' Ng in legal proceedings to be instituted against such person who may be liable to Dato' Ng or his estate and to act as next friend or guardian *ad litem* of Dato' Ng in legal proceedings generally.

[27] The Court of Appeal further held that the MHA is a substantive law in an Act of Parliament which must prevail over a subsidiary legislation in the form of O. 76 r. 2(1) of the ROC which is only procedural law. It further held that the committee order, unless set aside, is a valid and good order and ought to be honoured by the court.

[28] The Court of Appeal opined that O. 76 r. 2(1) of the ROC was not to create or to cause obstructions as the said order was intended to give access to justice especially to the person who is not able to manage himself or his affairs in view of the mental disorder. Relying on another Court of Appeal case of *Ziko Abbo & Anor v. Ketua Polis Daerah Bau, Kuching, Sarawak & Ors* [2011] 3 CLJ 76, the Court of Appeal had that the order "belongs to a species of social legislation which must be construed literally in favour of the patient."

[29] The Court of Appeal thus concluded that the learned High Court Judge (as he then was) was plainly wrong in having struck out the appellants' case based on the sole ground that the appellants were not clothed with the necessary *locus* to initiate the proceedings on ground of non-compliance with O. 76 r. 2(1) of the ROC.

[30] The respondent filed a motion for leave to appeal to the Federal Court on 13 December 2016 but on 13 February 2018 the Federal Court dismissed the motion for leave and ordered the matter to be remitted back for trial.

[31] On 31 May 2019 a different High Court Judge heard the witnesses and dismissed the appellants' claim with costs of RM10,000 on the following grounds as summarised by learned counsel for the appellants:

(i) the appellants had adequate locus to prosecute and maintain the present action;

(ii) section 24 of the Limitation Act 1953 ("s. 24") is not unconstitutional as at its core, s. 24 does not discriminate against persons of disability, as it in fact provides a facility by which time is extended. As such, it aids persons under disability. The fact that it has been worded in a manner to only assist persons whose disabilities were in existence at the time the cause of action accrued does not, in His Lordship's view, mean it is discriminatory in a manner that justifies to be struck down by the courts;

(iii) the contention that s. 24 affords a shorter period of limitation for a person like in Dato' Ng's position was not made out;

(iv) the appellants were appointed pursuant to an order of court granted on 6 December 2013, which gave them approximately two weeks to have filed this action before the onset of limitation. The failure of the appellants to do so meant that the action was time-barred;

(v) the respondent had failed to discharge the evidential burden of proving that payment was made under the shares sales agreement; and

(vi) had His Lordship not ruled that the appellants were out of time, the learned High Court Judge would have entered judgment against the respondent.

[32] Dissatisfied with the decision of the High Court, the appellants had filed an appeal to this court against that part of the decision of the High Court on limitation having set in.

[33] We are of the view that although there was an earlier decision of the previous High Court on the fact that limitation had not set in, that finding was of an interlocutory application in the context of a striking out application where the test is whether the plaintiffs' claim was "obviously unsustainable" without descending to detailed findings of disputed facts and the ultimate

merits of the claim. It is open to the parties to argue the issue more fully and finally after the trial where the relevant dates would all be before the trial court on whether or not limitation has set in.

[34] The new learned High Court Judge hearing the matter was at liberty to come to his own finding on the issue of limitation based on the clearer dates that had then come to the fore in the evidence of the witnesses before the High Court. The new High Court Judge was not bound by what is a tentative finding on limitation by the previous judge for the purpose of a striking out application. In any event, this Court of Appeal is certainly competent to deal with the issue of limitation on appeal by the appellants as the appeal was validly brought.

[35] This is even more so when there is no notice of appeal filed by the respondent with respect to the issue of liability if not for limitation having set in. The result is that if this Court of Appeal had agreed with the appellants on "limitation" then judgment would invariably be entered against the respondent.

[36] However if this court is not with the appellants, then the appeal would stand dismissed and upon leave being granted by the Federal Court, which we now learned has been granted, then the appeal to the Federal Court is confined to the issue of "limitation" and not on the finding of liability of the respondent if not for the claim being statute-barred.

Whether The Cause Of Action Arose More Than Six Years Before The Filing Of The Claim

[37] The learned trial judge identified a few possible dates for the commencement of the cause of action. Why a few dates? That was because though we know the date of the shares sale agreement for the sale of shares entered into by the late Dato' Ng to be 16 October 2006, and that by the terms of cl. 4.1 of the agreement the completion date was within 11 weeks from the agreement date, yet there were some extensions of time to pay the balance purchase price given to the purchaser respondent, who was the defendant in the High Court below.

[38] Under the shares sale agreement, Dato' Ng together with three other vendors of the 5,280,002 shares in Pahlawan agreed to sell all their shares to the respondent upon the terms and conditions set out in the agreement for a purchase consideration of RM12,144,004.60 only. Dato' Ng's own portion was 2,310,000 shares in Pahlawan ("the shares") which he sold under the shares sale agreement for RM5,313,000 only.

[39] The transfer form for the shares in Form 32A was dated 15 November 2007 and the same was deposited with the respondent's servants and agents and the transfer of the shares was effected in favour of and registered in the respondent's name *via* Certificate No. 056 on 18 December 2007.

[40] The latest date for the accrual of the cause of action would be the date of registration of the shares in the purchaser's name as under cl. 4.3 the balance consideration ought to have been payable upon the registration of the shares in the name of the purchaser; there being no evidence adduced that Dato' Ng had ever agreed to payment at a date even after the registration of the shares in the respondent's name. The last day to file the writ action would be 17 December 2013.

[41] The committee order was obtained on 6 December 2013 and so was still some 11 days left before limitation sets in. Whatever dates are taken, the common denominator is that the six-year limitation period would have been over as the suit was filed in the High Court on 29 April 2015.

Whether The Limitation Period Should Be Suspended Because Of An Intervening Disability

[42] It is agreed between the parties that when the cause of action arose, no disability has set in yet. The Limitation Act 1953 does not provide for a suspension of the limitation period for a case where the cause of action has arisen before the disability sets in.

[43] The Limitation Act 1953 provides for a suspension of the limitation period if the person suing was already under disability when the cause of action arose. It is suspended for the period during which the disability is operating and comes to an end when the disability ceases or when a committee is appointed under the MHA to manage the affairs of the person under disability.

[44] Learned counsel for the appellants said that there is something wrong here. He submitted that the law should not discriminate between a person who suffers disability when his cause of action arises and one in which the cause of action arises before disability sets in. Whilst accepting the fact that s. 24 of the Limitation Act 1953 is silent on its application to a case of subsequent disability, learned counsel for the appellants nevertheless urged upon this court that s. 24 is unconstitutional as it does not accord the same rights to a person who suffers a condition of subsequent disability compared to those who had suffered from the disability before or at the date the cause of action arose.

[45] Learned counsel for the appellants further observed that there is also no express prohibition in the Limitation Act 1953 either and so there is a lacuna in respect of the legal position of subsequent disability under the Limitation Act 1953. Learned counsel further submitted that in the interest of justice this court should interpret s. 24 purposively and extend it to cases of a subsequent disability so as not to offend the equality before the law provision enshrined in art. 8 of the Federal Constitution.

[46] The simple but persuasive argument is that the law should treat both persons the same way in granting him a suspension of limitation period for the time when he is under disability. It is pivoted as a breach of the Federal Constitution for the Legislature to have discriminated against persons who suffer disability after his cause of action has arisen without giving him the same benefit of a suspension of limitation period like those under a disability when his cause of action arose.

[47] Section 24(1) of the Limitation Act 1953 is set out below for all to appreciate its full import and implications:

> If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, **the action may be brought at any time before the expiration of six years,** or in the case of actions to which section 6(4) or section 8 of this Act applies, one year from the **date when such person ceased to be under a disability or died**, whichever event first occurred notwithstanding that the period of limitation had expired:
>
> Provided that in any case to which the provisions of section 29 of this Act apply, this subsection shall apply as if the date from which the period of limitation begins to run were substituted for the date when the right of action accrued. (emphasis added)

[48] However the punch in art. 8's prohibition against unequal treatment of the law is that like must be treated alike and not that not-alike should be treated alike. Thus, all those who are already under disability when their cause of action arose would have the same benefit of suspension of limitation until the disability ceases.

[49] Likewise those whose cause of action has arisen only after the disability sets in would not have the benefit of suspension of limitation during the period of limitation.

[50] Learned counsel for the appellants drew the court's attention to s. 17A of the Interpretation Acts 1948 and 1967 which enjoins a purposive approach in statutory interpretation:

> **17A Regard to be had to the purpose of the Act**
>
> In the interpretation of a provision of an Act, a **construction that would promote the purpose or object underlying the Act** (whether that purpose or object is expressly stated in the Act or not) **shall be preferred** to a construction that would not promote that purpose or object.
>
> (emphasis added)

[51] It is not a question of discriminating against the latter but a case where Parliament, in all its wisdom, has not legislated for a suspension of limitation period.

[52] Perhaps some reasons may be proffered why there is a difference in treatment between the two categories of persons referred to above.

[53] In the case of the person who is already under disability when his cause of action arises, it would be causing him undue hardship if limitation begins to run immediately. Take for example an action in tort where he is being run down by a vehicle while waiting to cross a road and he suffers a severe head injury and is in a coma.

[54] His cause of action arose when he was knocked down by the vehicle for supposedly under the tort of negligence. He may take a while before he recovers and comes out of his coma. In the event that he does not then a committee would have to be appointed to manage his affairs and again that may take some time.

[55] Whatever it is, we know how to objectively pinpoint the time when limitation would ordinarily begin to run in that it was at the time of the accident and hence when it is suspended until the disability ceases or a committee is appointed. In a case where the disability sets in after the cause of action has arisen, it is difficult if not impossible to identify at what point in time limitation should be suspended. There is also the prejudice caused to the defendant if the plaintiffs' family members were to apply for a committee order many years after the limitation period is over for not only would memory fade and vital documents may no longer be retrievable but that the sword of Damocles would be hanging over the heads of such a defendant for a long time until the family members should decide to apply to court for a committee order.

[56] Learned counsel for the appellants, with much energy and industry, had explored the changes in the law in the United Kingdom, Canada, Western Australia and New Zealand arising out of what is a general dissatisfaction with the old position of the law that provides for suspension of the limitation period in a case where mental disability had set in when the cause of action arose and when the disability sets in after the cause of action has arisen.

[57] Thus in the Limitation Act 2005 of Western Australia ("the WA Act"), s. 35 of the WA Act provides, *inter alia*:

> 35. Suspension of time while person with mental disability is without guardian
>
> (1) If:
>
> (a) **a person is suffering a mental disability at any time after a cause of action accrues to the person;** and
>
> (b) during the time in which the person is suffering the mental disability the person is without a guardian,

A

> the time **during which the person is without a guardian does not count** in the reckoning of a limitation period for commencing an action on the cause of action. (emphasis added)

[58] In Canada, s. 25 of the Limitation Act Chapter 13 ("the Canada Act") provides as follows:

B

> 25(1) Subject to section 26, *if a person with a claim becomes a person under a disability, the basis limitation period and the ultimate limitation period applicable to the claim do not run while the person continues to be a person under a disability*. (emphasis added)

[59] At the outset this court cannot fail to observe, and as pointed out by learned counsel for the respondent, that those jurisdictions dealt with the issue by way of amendments to their existing legislation and not by way of a challenge on the unconstitutionality of the provision that provides for a suspension of the limitation for one and not for the other.

D

[60] Learned counsel had not referred us to any authorities in those jurisdictions where even before the amendment, the courts there have struck down the relevant provision in their limitation legislation as being unconstitutional or that the provision does not apply to a case of an intervening disability after the cause of action has arisen or that the courts there had held that their existing provisions were inapplicable in a case of supervening disability.

E

[61] In the old English case of *Purnell v. Roche* [1927] 2 Ch. 142 at p. 145 the court there had to interpret s. 3 of the Real Property Limitation Act 1874 which reads:

F

> That section, so far as material, is as follows:
>
> "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land ... shall have first accrued as aforesaid such person shall have been under" [the disability of] "unsoundness of mind, then such person may, notwithstanding the period of twelve years, ... hereinbefore limited shall have expired, make an entry or bring an action or suit, to recover such land at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability."

G

[62] It was held, as summarised in the head note, that:

H

> Held: that the right to commence proceedings first accrued, at the latest, at the date fixed for the redemption of the mortgage, which was a date earlier than that on which the mortgagee became of unsound mind; and that the foreclosure proceedings must be dismissed, inasmuch as, in view of the express words of the Real Property Limitation Act, 1837, a disability beginning after the date when the right to bring the action first accrued, or must be deemed to have first accrued, would not entitle the mortgagee to the protection given by s. 3 of the Act of 1874.

I

[63] Learned counsel for the appellants sought to persuade this court that where the Act is silent, as in this case, as there is no express prohibition on the suspension of time for persons under subsequent disability, guidance may be had from the principles in the Court of Appeal case of *Damai Jaya Realty Sdn Bhd v. Pendaftar Hakmilik Tanah, Selangor* [2015] 1 LNS 7; [2015] 2 MLJ 768 at p. 781, para. 16 which held, *inter alia,* as follows:

> Justice, equity and good conscience must be a starting and ending point to be considered in all decision making process and it is always subject to the rule of law, and *where the law is silent, the courts are obliged to deliver judgment according to justice, equity and good conscience, and at all times act within the framework of the rule of law and the Federal Constitution to preserve the integrity of the decision making process.* (emphasis added)

[64] The above case has to do with the proper interpretation of s. 301 of the National Land Code ("NLC") with respect to a certificate of sale where the appellant had paid the full purchase price at a public auction. The certificate of sale was not set aside and the question was whether s. 301 of the NLC was subject to the approval of the Estate Land Board ("ELB") under s. 214A of the NLC. It was thus a question of interpretation of statute and for the court to do it harmoniously with the other relevant provisions of the same statute.

[65] In the instant case learned counsel for the appellants agreed that s. 24 of the Limitation Act 1953 does not apply but that nevertheless the court should apply it also to a situation not covered by the provision because not to do so would cause injustice to a person whose disability arises after the cause of action has set in. That is a different point altogether.

[66] We cannot question the wisdom of the Legislature in not extending s. 24 of the Limitation Act 1953 to a person who suffers a disability subsequent to the date the cause of action has arisen.

[67] Learned counsel also found support for this approach in the Court of Appeal case of *Kerajaan Malaysia v. Ambiga Sreenevasan & Ors* [2016] 8 CLJ 330; [2016] 5 MLJ 721 at p. 744, para. 50 which held, *inter alia*, as follows:

> We were more in agreement with the submission of counsel of the defendants that *if it was the intention of the Legislature to impose a statutory civil liability or some penal sanction for failure to comply with the assigned responsibilities on the organisers, this would have been specifically provided for within the Act itself by the Legislature.* (emphasis added)

[68] As can be seen the issue was whether s. 6 of the Peaceful Assembly Act 2012 on the "responsibilities of organisers" imposes a statutory civil liability on the organisers and the answer was obviously that in the absence of a clear statutory provision imposing such a liability, there was none.

[69] Likewise in the absence of a clear statutory provision to suspend limitation in some ways to cases where the intervening disability was after the cause of action has arisen, we cannot be asked to read that suspension into s. 24 of the Limitation Act 1953.

[70] Learned counsel for the appellant cited what he said is a clear example of an express prohibition of the suspension of time in the cases of subsequent disability as can be seen in s. 9 of the India's Limitation Act 1963 ("the India's Act") which expressly states as follows:

> **Continuous running of time** – where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it ... (emphasis added)

[71] Learned counsel argued that since such an express prohibition is not in the Limitation Act 1953 and that the Act is silent on it, we should read as if there is no prohibition in applying s. 24 to a case of an intervening disability.

[72] Learned counsel for the appellants boldly concluded that not to do so would be to perpetuate a discrimination prohibited under art. 8 of the Federal Constitution.

[73] Actually we do not have to go as far as India for the position in Sabah and Sarawak is very clear in view of s. 8(1) of both the Limitation Ordinances which in effect provides that once time has begun to run, no subsequent disability or inability to sue shall stop it. See the *Law of Limitation* by Choong Yeow Choy published by Butterworths Asia 1995 at p. 89 where the learned author opined as follows:

> In the absence of a clear provision, it is submitted that there is no intention on the part of the legislature to grant a further extension of time.

[74] Learned counsel for the appellants sought to illustrate the discriminatory nature of s. 24 of the Limitation Act 1953 with some illustrations of three situations that highlighted the aberrations as follows:

> For this purpose the cause of action is the same for each situation and that the limitation period is ordinarily six years.
>
> Situation 1: **Person A – no disability either before or after the time the cause of action arises.**
>
> Where a person does not suffer from any form of disability, the limitation starts to run from the date the cause of action arises.
>
> Situation 2: **Person B – person under disability at the time the cause of action arises.**

If the person B was hit by a bus yesterday, rendering him as a person under disability yesterday, and the cause of action accrues today, person B would have been protected and would enjoy the benefit of section 24 of the Limitation Act 1953. Person B would then have 6 years to sue after his disability ceases.

Situation 3: Person C – person who was not under disability at the time the cause action arose but came under disability after that but before the six years are over.

If yesterday, a cause of action accrued for person C not under disability, but he has yet to commence a suit, and due to whatsoever reasons, today person C was hit by a bus and his injuries so severe that he is declared as a person under disability later. The time would continue to run and person C would be discriminated as he is only under a disability today after the cause of action arose yesterday! S. 24 of the Limitation Act 1953 will not assist him. (emphasis added)

[75] Learned counsel for the appellants emphasised that by just comparing persons A, B and C above, person C has a shorter period of limitation to bring his claim compared to someone like person A who is not under a disability and person B who suffers under a disability before the cause of action accrues.

[76] Learned counsel for the appellants submitted that in the case of person C, he was unfortunate enough to suffer from his illness and disability that had handicapped him and rendered him unable to handle his own affairs. More than that, the law then rubbed salt in his wound by cutting short the time available for him to bring an action to seek redress against the person who had wronged him.

[77] He argued that the harsh reality is that if person C does not cease from his disability at all and the six years has lapsed, person C or his personal representative of his estate or litigation representative would have lost the right to commence any suit.

[78] He further painted a picture of an extreme situation where person C was not under a disability when the cause of action arose but became disabled just one day later. Person C then remains under a disability for five years and 11 months and 28 days. When person C ceases to be under a disability, on his fifth year, 11 months and 28 days later, person C would only have one day left to commence a suit before the limitation sets in.

[79] Based on the above illustrations, learned counsel for the appellants argued that s. 24 of the Limitation Act 1953 discriminates person C in two ways:

(i) it discriminates between the person C and the rest of the persons who have six years to bring an action; and

(ii) it also discriminates between person C and any other disabled persons whose cause of action accrued on or after (not before) the date they were under a disability. The latter has a period of full six years from the date when he ceases to be under a disability but person C does not have.

[80] Whilst the illustrations of the three situations are helpful to drive home the message that there may be situations where unfairness may seem to work, yet we must appreciate the stark differences in a case of person B compared with person C. In person B's case, he is already under disability when the cause of action arises and so there is immediately known an objective time frame within which he must bring his action. The one who is to be sued would know that person B is under a disability.

[81] In the case of person C, it is different because the person that C wants to sue would not ordinarily know that C has subsequently suffered a disability. If documents are needed to defend a claim against him by C, he would probably think that since six years have passed and no suits have been brought, he would probably discard those documents. He cannot be waiting indefinitely for C to sue for in the first place he might not even know of C's intervening disability and it does not matter if the disability is a day after the cause of action has arisen or a month or a year or even some years later.

[82] The thing is this: whoever is taking care of C would roughly know at what point in time C seems not to be able to manage his own life as in a loss of memory or dementia. Generally, if C wants to sue, he would not generally wait until the 11th hour to sue only to find himself not being able to manage his own affairs. Whoever C is interacting with and assuming it is his family members, they would be able to see signs of disability coming to the fore and would have some time to apply to court for a committee order under the MHA.

[83] Whilst extreme examples may happen, they are extremely rare as for example C who was in the pink of health and waited until the last week of limitation setting in to begin to see his lawyer to sue and before his statement of claim could be finalised and approved, a car knocked into him and he became unconscious and had to be on a life-support system thereafter!

[84] Parliament would of course have to balance on the one hand the interest of people like C and on the other hand the interest of people that C has a cause of action against and see if it would be fair to wait indefinitely for C to sue.

[85] In the case of B, one may argue that one has to take B as one finds him, a person who is already under disability. It is not in B's favour too if there is too long a lapse of time before the litigation representative or committee appointed under the MHA decides to sue on his behalf.

[86] Article 8(1) of the Federal Constitution ("art. 8") guarantees equality for all persons before the law and it declares as follows:

> All persons are equal before the law and entitled to the equal protection of the law.

[87] Learned counsel for the appellants said that s. 24 of the Limitation Act 1953 does not treat all persons with a valid cause of action alike. It is therefore discriminatory, period. To say that is to miss the obvious. Section 24 of the Limitation Act 1953 treats all cases alike where the disability has set in before a cause of action has arisen. As for cases where there is an intervening disability after the cause of action has arisen, s. 24 of the Limitation Act 1953 is not applicable.

[88] Section 24 therefore treats like cases alike and unlike cases differently. For that matter one may look at the provision of s. 3 of the Limitation Act 1953 provides as follows:

> 3. This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other written law or to any action or arbitration to which the Government or the Government of any State is a party and for which if it were between subjects a period of limitation would have been prescribed by any other written law.

[89] Thus the Limitation Act 1953 does not apply if an action is governed by another statute that provides for a different period of limitation. An example familiar to all is that of suits brought against a public authority which is governed by s. 2 of the Public Authorities Protection Act 1948 ("PAPA") where an action in negligence for instance, must be brought within 36 months next after the act, neglect or default complained of.

[90] We may say that it is discriminatory because the same act, neglect and default in the case of an individual or corporation would be six years next after the act, neglect or default complained of but where it is against a public authority it is three years. It is not discriminatory and indeed no court has held it to be discriminatory because Parliament is at liberty to prescribe a different limitation period for different causes of action as well as against a different entity like a public authority for instance.

[91] Equality before the law is a dynamic concept. It is not to treat everyone equally because all of us are unequal to begin with and equal treatment can only perpetuate our current inequality. It is a concept that the law would treat like cases alike and unlike cases differently. To use legal language, there must be 'reasonable' or 'permissible' classification founded on 'intelligible differentia'.

[92] In *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155, at p.166 Suffian LP laid down the following principles in determining if a discriminating law is a good law under art. 8. His Lordship held as follows:

> In India discriminatory law is good law if **it is based on 'reasonable' or 'permissible' classification,** using the words used in the passage reproduced above from the judgment in *Shri Ram Krishna Dalmia*, provided that:
>
> (i) the classification is founded on **intelligible differentia** which distinguishes persons that are grouped together from others left out of the group; and
>
> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. **What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.** (emphasis added)

[93] Article 8 of the Federal Constitution is not intended to make unequals equal. As was pointed out by the learned author Srimurugan Alagan in *Federal Constitution – A Commentary*, 2019, Sweet & Maxwell at p. 123:

> 84. ... Article 8(1) simply means that there must be a subjection of equal laws, applied alike, to all persons in the same circumstances. *The validity of a law relating to equals can only be tested properly if it applies alike to the same class of persons, which can be ascertained by the application of the doctrine of reasonable classification.* The corollary is that the doctrine of reasonable classification is the only method determining whether a law applies alike to all persons similarly circumstanced, and is, therefore, an integral part of Article 8(1). *If a law deals equally with all the persons of a well-defined class, it is not obnoxious and cannot be said to be denial of the right of equal protection by the law on the ground that it has no application to persons not within that class. Therefore, there is no discrimination among equals.* (*Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; [2004] 2 AMR 317, FC). (emphasis added)

[94] None of us would quibble over legislation that appears to have a certain bias towards the poor and weak in society who has little or no power to organise themselves to become something to be reckon with and who are often at the mercy of big corporations and the systems. We speak of some of these legislations as social legislation designed to even out the inherent prejudice often caused to the poor and powerless.

[95] As Suffian LP explained in *Datuk Hj Harun Hj Idris* (*supra*) at p. 165:

> While idealists and democrats agree that there should not be one law for the rich and another for the poor nor one for the powerful and another

> for the weak and that on the contrary the law should be the same for everybody, in practice that is only a theory, for in **all real life it is generally accepted that the law should protect the poor against the rich and the weak against the strong.** Thus few quarrel with the law prescribing different criteria of criminal and civil liability for infants as compared to adults, or with the law for the protection of women and children against men, for the protection of tenants against landlords and of borrowers against moneylenders, for the imposition of higher rates of quit rent on rubber estates compared to rice fields and on higher rates of income tax on millionaires compared to clerks. (emphasis added)

[96] In essence learned counsel for the appellants is in effect saying that there is a breach of art. 8 as where there is an extension of time for limitation in the sense of suspending limitation in a case where disability had set in before a cause of action arose, but there is no similar extension of time with respect to limitation where the disability set in after a cause of action had arisen.

[97] Learned counsel for the appellants submitted that there is no reasonable nexus between the classification and the object of the Limitation Act. Learned counsel for the appellants concluded that s. 24 of the Limitation Act 1953 is discriminatory. He ventured to say that s. 24 cannot be interpreted literally against person C.

[98] Learned counsel then impressed upon this court that where there is a lacuna in the law then under art. 162(6) of the Federal Constitution, this court may apply s. 24 with necessary modification to bring it into accord with art. 8. Article 162(6) provides:

> Any court or tribunal applying the provision of any existing law has not been modified on or after Merdeka Day under this Article or otherwise **may apply it with necessary modification** as may be necessary to bring it into accord with the provisions of this Constitution. (emphasis added)

[99] We accept the fact that in cases where it can be shown that a pre-Merdeka law is in conflict with the Federal Constitution, the court is constitutionally bound to interpret the offending provision to be *in tandem* with and consistent with the Federal Constitution.

[100] Thus the Federal Court in *Assa Singh v. Mentri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30 applied art. 162(6) to read the provisions of art. 5 of the Federal Constitution *vis-à-vis* personal liberty into the provisions of the Restricted Residence Enactment (Cap. 39 of the Law of the Federated Malay States) (see pp. 33 (Azmi LP), 40 (Suffian FJ), 44 and 45 (Gill FJ) and 46 (Raja Azlan Shah J)).

[101] Likewise in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 6 MLJ 289 at pp. 190 and 191 (CLJ); p. 309 (MLJ), the Court of Appeal applied art. 162(6) in a dispute involving the compulsory

acquisition of the native lands. The Court of Appeal interpreted s. 12 of the Aboriginal Peoples Act 1954 in a manner that the express provision which conferred discretion to the State Authority to grant compensation was taken out from the said section:

> This is exactly what art 162(6) of the Constitution says. That article reads:
>
> Any court or tribunal applying the provision of any existing law has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.
>
> The way in which s. 12 is to be brought into conformity with the Constitution is to make it yield to art. 13(2) which reads:
>
> 13(2) No law shall provide for compulsory acquisition or use of property without adequate compensation.
>
> *That is achieved by not reading the words 'the State Authority may grant compensation therefor' as conferring a discretion on the State Authority whether to grant compensation or not. For otherwise it would render s. 12 of the 1954 Act violative of art. 13(2) and void* because it will be a law that provides for the compulsory acquisition of property without adequate compensation. *A statute which confers a discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any compensation. It is therefore a law that does not provide for the payment of adequate compensation A and that is why s. 12 will be unconstitutional. Such a consequence is to be avoided, if possible, because a court in its constitutional role always tries to uphold a statute rather than strike it down as violating the Constitution.*
>
> …
>
> How then do you modify s. 12 to render it harmonious with Article 13(2)? *I think you do that by reading the relevant phrase in section 12 as 'the State Authority shall grant adequate compensation therefor.' By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete. I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this.* But here you have a direction by the supreme law of the Federation that such modifications as the present must be done. *That is why we can resort to this extraordinary method of interpretation.*
>
> (emphasis added)

[102] We are not unaware of a similar approach taken by Zainun Ali FCJ, *albeit* a powerful dissenting judgment, in *Ketua Polis Negara & Ors v. Nurasmira Maulat Jaffar & Ors And Other Appeals* [2018] 1 CLJ 585; [2018] 3 MLJ 184, at pp. 206 and 207.

[103] Learned counsel for the appellants drew the attention of this court to a similar approach from other Commonwealth jurisdictions (that of the Privy Council) where the courts there were confronted with a statute or a provision therein that is inconsistent with the constitution (see *Attorney-General Of The Gambia v. Momodou Jobe* [1984] 1 AC 689 at p. 702 and *Hector v. A-G Of Antigua And Barbuda & Ors* [1990] 2 All ER 103, at p. 107).

[104] The Limitation Act 1953 was revised in 1981 and the Law Revision Commission had not seen it fit to effect any necessary modification to it. Whilst the Limitation Act 1953 is a pre-Merdeka law, we are not convinced that it is in conflict with art. 8 of the Federal Constitution.

[105] We are not persuaded that we can interpret s. 24 of the Limitation Act 1953 as extending the same suspension of limitation to a case where the disability sets in after the cause of action has arisen. It is productive of uncertainty for the person being sued as he would in all probabilities be unaware of a disability having set in for the party suing him, not to mention when exactly the disability would have set in though one may know, *albeit* after the event, when a committee order is made.

[106] After all the law starts with the presumption that everyone is in control of his faculties and sane and able to manage himself and his affairs.

[107] It does not promote certainty in the law if one cannot tell with objective certainty when limitation starts to run or is suspended before it begins to run again. Other than in an accident that caused the person suing to have severe brain damage and which rendered him vegetative or brain dead, and this may not even be within the knowledge of the proposed defendant, there will always be the uncertainty of when a person suing has lapsed into disability.

[108] In all other cases, it is a slow and gradual process of a person forgetting things and finally not recognising people and when the family members do apply for a committee order, it is accompanied by a medical report that would support why a committee order has to be made and the date when the person became incapable of managing himself is not stated save that at the date of the committee order he must already be incapable of managing his affairs and himself.

[109] As we had stated before, the person being sued would not know that there is still available a cause of action after the normal period of six years in cases of contract and tort until he is being served with a summons by the committee appointed to manage the disabled person and his affairs. The person being sued may no longer be retaining relevant documents past the limitation period and it would probably work injustice for him to wake up one day to discover that he had been sued even after limitation period has ordinarily set in because the person suing through the committee appointed by court had lapsed into and suffered disability unbeknown to the defendant.

[110] This is to be contrasted with a case where in contract and more so in tort when the tortfeasor is required to take his victim as he finds him, example for instance that he was already disabled at the date the cause of action arose.

[111] It raises the question as to whether and when the judicial arm may make laws which the legislative arm of the Government has not made a separate provision governing a case of intervening disability but rather made it subject to the general provisions governing limitation period for the cause of action. These shall be explored below.

Whether The Court May Interpret A Provision Of A Legislation As Applicable To A Case Which Does Not Come Under Its Provision So As To Avoid An Apparent Injustice

[112] This is not a case where the court may interpret the words of s. 24 of the Limitation Act 1953 by ignoring the words there and supplying words not there so as to provide a corresponding suspension of limitation period to apply to a case of disability arising after the cause of action has arisen.

[113] In fact as submitted by learned counsel for the appellants, it requires the addition of another proviso to s. 24 of the Limitation Act 1953 that reads:

> Provided that if a person is under a disability at any time after a right of action accrues, the time during which the person continues to be under a disability shall not be taken into account in the computation of the six years limitation period.

[114] It is for Parliament to legislate if there is a *lacuna* in the law as submitted by learned counsel for the respondent, though in this case there is none because Parliament provides for the normal limitation period to apply in a case not covered by s. 24 of the Limitation Act 1953. Section 24 thus is an exception to the general rule with respect to limitation. If one does not come within the exception provided, the court cannot under the guise of doing justice, legislate on behalf of Parliament. The judiciary would be encroaching into the domain of the Legislature and that is against the doctrine of the separation of powers where one respects the boundary of the other and both convention and comity expect this mutual respect to be maintained in a functioning democracy.

[115] One needs only to look at the amendments introduced by the Limitation (Amendment) Act 2018 (Act A1566) to appreciate that where the strict application of limitation may work injustice in the case of latent defects or injuries other than personal injuries in a tort claim, there was nothing the court could do without violating the domain of the Legislature to make new laws to address this issue. The amendment came into effect on 1 September 2019.

[116] In fact when the courts tried to interpret the law by stretching it to accommodate a situation so as to produce a fair result, there was much uncertainty with different courts arriving at different conclusions.

[117] Thus there were cases where the courts applied the strict interpretation of words used and held that limitation had set in from the date the cause of action arose and not from the date of discovery of the latent defect, injury or damage. The cases are as follows:

(i) *AmBank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [2010] 3 MLJ 784 (Court of Appeal) – Claim for negligence against a solicitor;

(ii) *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd* [2014] 8 CLJ 188; [2015] 1 MLJ 490 (Court of Appeal) – Claim for negligence against a solicitor; and

(iii) *Sharikat Ying Mui Sdn Bhd v. Hoh Kiang Po* [2016] 1 LNS 1442; [2015] MLJU 621 (High Court) – Claim for breach of company director's fiduciary duty.

[118] Some courts in trying to buffer the harshness of the strict interpretation of s. 6 of the Limitation Act 1953 had interpreted the cause of action as having accrued or arisen from the time the injury, defect or damage was discovered or could have been reasonably discovered. The cases are as follows:

(i) *AmBank (M) Bhd v. Kamariyah Hamdan & Anor* [2013] 5 MLJ 448 (Court of Appeal) – Claim for negligence against a solicitor;

(ii) *Peninsular Concord Sdn Bhd v. Syarikat Bekalan Air Selangor* [2015] 3 CLJ 682 (High Court) – Claim for illegal consumption of water; and

(iii) *CIMB Bank Bhd v. Lee Kim Kee & Ors And Another Appeal* [2018] 9 CLJ 168; [2018] 3 MLJ 72 (Court of Appeal) – Claim for negligence against a financial institution and its officer.

[119] The amendment introduced involves *inter alia* a new s. 6A Limitation Act 1953 of the to address this issue as follows:

> **6A. Limitation of actions to claim damages for negligence not involving personal injuries**
>
> (1) Notwithstanding subsection 6(1), this section shall apply to any action for damages for negligence not involving personal injuries, where the starting date for calculating the period of limitation under subsection (2) falls after the date on which the cause of action accrued.
>
> (2) An action to which this section applies shall not be brought after the expiration of three years from the starting date if the period of three years expires later than the period of limitation prescribed in subsection 6(1).
>
> ILLUSTRATIONS
>
> (a) C bought a house from D in 2000. In 2010, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2010 to file an action in court against D for damages.

(b) C bought a house from D in 2000. In 2006, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2006 to file an action in court against D for damages.

(c) C bought a house from D in 2000. In 2005, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2002, two years after C moved into the house. C has three years from 2005 to file an action in court against D for damages.

(3) Notwithstanding subsection (2), no action shall be brought after the expiration of fifteen years from the date on which the cause of action accrued.

ILLUSTRATION

C bought a house from D in 2000. In 2017, C discovered a crack which damaged the walls badly. A building report made by a consultant revealed that the cracks had occurred in 2001, one year after C moved into the house. C cannot commence an action because he has already exceeded the fifteen-year limitation period.

(4) For the purposes of this section:

(a) "starting date" means the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action;

(b) "knowledge required for bringing an action for damages in respect of the relevant damage" means knowledge of:

(i) the material facts about the damage in respect of which damages are claimed;

(ii) other facts relevant to the current action:

(A) that the damage was attributable in whole or in part to that act or omission which is alleged to constitute negligence;

(B) the identity of the defendant; and

(C) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant, and

(iii) includes the knowledge which the plaintiff or any person in whom the cause of action was vested before him might reasonably have been expected to acquire:

(A) from facts observable or ascertainable by him; or

(B) from facts ascertainable by him with the help of appropriate expert advice which is reasonable for him to seek,

but the plaintiff or the person in whom the cause of action was vested before him shall not be limited under this subparagraph to knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain and, where appropriate, to act on that advice.

(5) Knowledge that any act or omission did or did not, as a matter of law, involve negligence is irrelevant for the purposes of subsection (4).

[120] A corresponding amendment had then to be made in a case of a s. 24 situation where a disability arises before the discovery of the latent defect or injury and this Parliament did by introducing s. 24A of the Limitation Act 1953 as follows:

24A. Extension of limitation period under section 6A in case of disability

(1) If on the date when any right of action accrued for which a period of limitation is prescribed under section 6A, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of three years from the date when such person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation had expired.

(2) An action may not be brought by virtue of subsection (1) after the end of limitation period prescribed under subsection 6A(3).

ILLUSTRATIONS

(a) In 1987, D constructs a building in such a way that he is liable in the tort of negligence to P, the owner. Actual damage occurs, triggering the cause of action, in 1988. The damage becomes discoverable in 1992, but in 1989 P becomes mentally incapable, and does not regain his capacity until 1993. P has three years from 1993 to file an action in court against D for damages.

(b) In 1987, D constructs a building in such a way that he is liable in the tort of negligence to P, the owner. Actual damage occurs, triggering the cause of action, in 1988. The damage becomes discoverable in 1992, but in 1989 P becomes mentally incapable, and does not regain his capacity until 2004. P cannot commence an action because the fifteen-year limitation period has been exceeded.

Explanation:

(a) Illustration (a) is for the situation where an action may be brought within three years from the date a person under a disability ceased to be under the disability.

A (b) Illustration (b) is for the situation where an action cannot be brought after the expiration of fifteen years from the date on which the cause of action accrued.

(3) Where any such person as is referred to in subsection (1) was on such date under two disabilities or where before the disability which he was B under on such date had ceased he was affected by another disability he shall be deemed for the purposes of this section to have continued under a disability until both such disabilities have ceased.

(4) Nothing in subsections (1) and (3) shall affect any case where the right of action first accrued to some person not under a disability through whom the person under a disability claims. C

(5) When a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under a disability, no further extension of time shall be allowed by reason of the disability of the second person.

D **[121]** Parliament could have provided for another situation where the disability arises after the discovery of the latent defect or injury other than personal injury but it did not see it fit to do so. It would have been a golden opportunity not to be missed for there had been no prior amendment to the Limitation Act 1953 before. In its wisdom it has decided not to do so.

E **[122]** The courts would have to read words into s. 24 of the Limitation Act 1953 which words are not there to make s. 24 applicable to cases where the disability occurs subsequent to the date the cause of action has arisen. That liberty rarely presents itself and it is only available where the context clearly justifies it.

F **[123]** In the recent Federal Court case of *AJS v. JMH & Another Appeal* [2022] 1 CLJ 331; [2022] 1 MLJ 778 at pp. 355 and 356 (CLJ); p. 800 (MLJ) (Federal Court), Tengku Maimun CJ reiterated as follows:

[44] In this context and reverting to statutory interpretation, authorities are replete on the principles or rules of statutory interpretation. Suffice it G that I refer to the judgment of this court in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v. Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 7 CLJ 561; [2020] 4 MLJ 721 where the rules of statutory interpretation is stated thus:

H [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the legislature and to give effect to the words used by it. The court will not read words into a I statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the

words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural ordinary meaning. *It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'.* Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect of it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. *It follows that a statute has to be read in the correct context and that as such, the court is permitted to read additional words into a statutory provision where clear reason for doing so are to be found in the statute itself.*

(emphasis added)

[124] In *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113 Augustine Paul FCJ said at pp. 200 and 201 (CLJ); p. 129 (MLJ):

Thus, when the language used in a statute is clear effect must be given to it. As Higgins J said in *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at pp. 161-162:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and *when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable.*

The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v. Singhai Kepurchand* 1976 Jab LJ 340). Thus the duty of the court, and its only duty, is to expound the language of a statute in accordance

A with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39).
(emphasis added)

B **[125]** In *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449 at p. 450 Abdoolcader SCJ adopted the more strident language of staying clear of passing judgment on statutes:

> We would in this regard also advert to the decision of the House of Lords in *Thompson v. Goold & Co* where Lord Mersey said in his speech (at
C p. 420): **'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.'** Even more pertinent perhaps would be the speech of Lord Loreburn, LC in *Vickers, Sons and Maxim, Limited v. Evans:*
>
> > My Lords, this appeal may serve to remind us of a truth sometimes
> D forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. *We are considering here not what the Act ought to have said, but what it does say; ... The appellant's contention involves reading words into this clause. The clause does not contain*
> E *them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.*
> (emphasis added)

[126] The judges after all are not the people's elected representatives though we have no less legitimacy because of our entrenched role in the Constitution
F to interpret the laws and to apply them to the facts as held and to ensure a just, fair, equitable and reasonable outcome in accordance with the law. We may at times lament on the inadequacy of some legislation so that others in a civil society and lawyers in particular may lobby their elected Members of Parliament on a particular course of conduct.

G **[127]** Our powers to do justice in the cases before us is in accordance with the law, whether statute or case law or a combination of both and not according to our own dictates of what the law should be. Thus, in *Affin Credit (M) Sdn Bhd v. Yap Yuen Fui* [1984] 1 CLJ 149; [1984] 1 CLJ (Rep) 62; [1984] 1 MLJ 169 at p. 65 (CLJ); p. 171 (MLJ) the Federal Court observed
H as follows:

> ... the Courts have no power to legislate where there there is a gap in the provisions of a statute and for this legal proposition counsel relies on the case of *Magor and St Mellons Rural District Council v. Newport Corporation* [1952] AC 189 191 where the House of Lords in upholding the majority
I decision of the Court of Appeal, made scathing criticisms of Lord Denning's dissenting opinion. There it was held that *in the construction of a statute, the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. To do so would be to usurp the function of the legislature.* (emphasis added)

Decision

[128] For the reasons given above, we were constrained to dismiss the appeal of the appellants. The learned judge had not erred in his interpretation of s. 24 of the Limitation Act 1953. Sadly, and most solemnly, limitation with all its stark reality had set in by the time the suit was filed in the High Court below.

[129] The appeal was thus without merits and we dismissed it with costs of RM10,000 to the respondent subject to allocator.